



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Alfaro Corporation

File: B-258637

Date: February 9, 1995

Joel S. Rubinstein, Esq., and Andrew N. Cook, Esq., Bell, Boyd & Lloyd, for the protester.
Philip D. Paschall, Esq., and Riggs L. Wilks, Jr., Esq., Department of the Army, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that included a price of \$0 for a contract line item that was subject to a statutory cost limitation could not be rejected as nonresponsive where there is no indication that the bid's pricing structure/apportionment of costs was designed to circumvent the statutory cost limitation.

DECISION

The Alfaro Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DADA15-94-B-0015, issued by the Department of the Army for the replacement of a sprinkler system at the Walter Reed Army Medical Center, Washington, D.C., including maintenance and repair of the existing system and new work.

We sustain the protest.

Bidders were required under the solicitation's bidding schedule to submit prices for contract line item number (CLIN) 0001AA (maintenance and repair work), CLIN 0001AB (new work), and a total price, which was the basis for award. Bidders were advised in the schedule that CLIN 0001AB was subject to a statutory cost limitation of \$300,000. The IFB also included the standard "Cost Limitation" clause, as set forth at Defense Federal Acquisition Regulation § 252.236-7006. This clause provides as follows:

"(a) Certain items in this solicitation are subject to statutory cost limitations. The limitations are stated in the Schedule.

"(b) An offer which does not state separate prices for the items identified in the Schedule as subject to a cost limitation may be considered nonresponsive.

"(c) By signing its offer, the Offeror certifies that each price stated on items identified as subject to a cost limitation includes an appropriate apportionment of all costs, direct and indirect, overhead, and profit.

"(d) Offers may be rejected which--

(1) Are materially unbalanced for the purpose of bringing items within cost limitations; or

(2) Exceed the cost limitations, unless the limitations have been waived by the Government prior to award."

Alfaro submitted the low bid of the seven bids received, with a price for CLIN 0001AA of \$468,000, a price for CLIN 0001AB of \$0, for a total bid of \$468,000.

The agency determined that Alfaro, by submitting a price of \$0 for CLIN 0001AB, had failed to "provid[e] the cost for this line item." The agency explains that because Alfaro did not provide a "realistic price" for the new work required under CLIN 0001AB, the agency could not determine whether Alfaro had apportioned its costs for the new work and for the repair work in an appropriate manner as required by the IFB's Cost Limitation clause. The agency concluded that because Alfaro did not submit cost apportionment information demonstrating compliance with the statutory cost limits expressed in the IFB, its bid was nonresponsive.

The general rule with respect to statutory cost limitations is contained in Federal Acquisition Regulation (FAR) § 36.205, which provides that contracts shall not be awarded at a cost in excess of the statutory cost limitation, unless the limitation has been properly waived for the particular procurement. William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502. Therefore, in the absence of a waiver, a bid exceeding the applicable cost limit must generally be rejected. K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139. Additionally, bids which do not exceed statutory cost limitations applicable to particular CLINs, but which are within the statutory limitations only because they contain pricing structures designed to circumvent the applicable statutory cost

limitations, must also be rejected. FAR § 36.205(d); ABC Siding & Remodeling, B-213390, July 10, 1984, 84-2 CPD ¶ 32; Chrysler Corp., B-182754, Feb. 18, 1975, 75-1 CPD ¶ 100.

As conceded by the agency, Alfaro's bid did contain a separate price for CLIN 0001AB, and that price of \$0 was below the statutory limitation for this CLIN of \$300,000. As such, Alfaro's bid cannot be rejected as nonresponsive on the basis that it did not submit a price for CLIN 0001AB or that its price for CLIN 0001AB exceeded the applicable statutory cost limitation.

The inquiry as to the acceptability of Alfaro's bid does not then end, as the agency contends, with the consideration of only whether Alfaro's bid demonstrated an appropriate apportionment of costs between CLINs 0001AA and 0001AB. Rather, the controlling question with regard to whether Alfaro's bid may be accepted is whether the bid's pricing structure/apportionment of costs was designed to circumvent the statutory cost limitation. FAR § 36.205(d); ABC Siding & Remodeling, *supra*; Chrysler Corp., *supra*. In other words, did Alfaro transfer the costs/profit/overhead associated with the new work under CLIN 0001AB to CLIN 0001AA to circumvent the \$300,000 limitation applicable to CLIN 0001AB?

As the record demonstrates, there is no suggestion that Alfaro transferred any of its costs for performing CLIN 0001AB to CLIN 0001AA to circumvent the \$300,000 limitation. In this regard, the work to be performed under CLIN 0001AB, in both the government's estimation and that of all other bidders responding to the solicitation, could be performed for well under \$300,000. The independent government estimate (IGE) for CLIN 0001AB was \$95,581--less than a third of the applicable limitation. Additionally, according to the bid abstract, none of the other bids received contained prices for CLIN 0001AB which approached the limitation. For example, the next three low bids received set forth the following prices:

	CLIN 0001AA	CLIN 0001AB	TOTAL
F&W Fire Protection	\$435,088	\$75,688	\$510,776
Lyndale Construction	\$410,150	\$103,850	\$514,000
Biscayne Contractors	\$405,348	\$109,652	\$515,000 ¹

¹The agency has not argued nor is there any indication that the agency believes that its IGE for CLIN 0001AB of \$95,581, is inaccurate, or that the prices of bidders other than Alfaro for CLIN 0001AB did not reflect the bidders' costs/profit/overhead for performing this work. The

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While it is not clear why Alfaro structured its bid as it did, given the government estimate and the other prices received, we fail to see how Alfaro's bid can properly be considered as reflecting an intention to circumvent a cost limitation² considerably in excess of what the government and all other bidders believe to be a reasonable price for CLIN 0001AB.

Accordingly, because the agency found Alfaro's bid otherwise responsive, we recommend that the agency consider Alfaro's bid responsive and make award to that firm if otherwise appropriate. Alfaro is also entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Alfaro should submit its certified claim

¹(...continued)

remaining three bids received in response to the IFB provided prices for CLIN 0001AB of \$112,800, \$250,000, \$265,000.

²In rejecting Alfaro's bid, the agency relied upon Ward Constr. Co., B-240064, July 30, 1990, 90-2 CPD ¶ 87, which concerned an IFB with a bid schedule similar to that present here. That is, the IFB set forth two CLINs, only one of which was subject to a statutory cost limitation, and a space for a total bid price. In Ward, we found proper the agency's rejection of a bid that contained only the total bid price with no prices entered for either of the CLINs because the bid may result in either the violation or circumvention of the statutory cost limitation and there was no evidence in the bid from which to conclude this was not the case. In contrast, the record demonstrates that Alfaro's bid does not violate nor is it structured to circumvent the limitation.

³The agency also complains that Alfaro "miscertified that its zero bid price for the new work line item represents an apportionment of costs for that work." To the extent that Alfaro can be considered as having miscertified that CLIN 0001AB included all costs for performing the work to be performed thereunder, this does not provide a basis for rejecting Alfaro's bid as there is no evidence that the alleged miscertification was made in bad faith or to mislead the agency. See Universal Technologies Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212. That is, there is no indication that Alfaro, in signing its bid, intended to mislead the agency into determining that Alfaro's costs for CLIN 0001AB were below the statutory cost limitation where in actuality they were not and were included in Alfaro's price for CLIN 0001AA.

for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

\s\ Robert P. Murphy
for Comptroller General
of the United States